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REMCO ENGINEERING & CONSTRUCTION SDN BHD v. KEMJI ENGINEERING SDN BHD

HIGH COURT MALAYA, TAIPING
MOHAMED ZAINI MAZLAN JC
[APPEAL NO: 12BNCVC-19-9-2014]
B 24 APRIL 2015

CIVIL PROCEDURE: *Time – Extension of – Delay in serving notice of appeal – Application for extension of time – Whether convincing reasons submitted for court to exercise discretion – Whether solicitors exhibited sense of remorse and provided explanation for delay – Whether application for extension of time ought to be granted*

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The appellant's claim was dismissed by the Sessions Court after full trial and the decision was delivered on 4 September 2014. Although the appellant filed its appeal within 14 days, it failed to serve the notice of appeal on the
D respondent's solicitors within 14 days. Consequently, the respondent proceeded to file an application to strike out the appellant's appeal ('respondent's application'). In consequence, the appellant filed an application for an extension of time to serve the notice of appeal ('appellant's application'). In the affidavit in support of the appellant's application, the
E appellant's solicitor averred that he had instructed his firm's clerk to serve the notice of appeal on the respondent's solicitors. He further averred that he only realised that the notice of appeal was not served on the respondent when the respondent's application was not served on him.

F **Held (allowing respondent's application; dismissing appellant's application):**

(1) It is settled law that an appeal is not competent until the notice of appeal is not only filed but also served. A notice of appeal, which was not served within time, was merely an irregularity and could be cured by
G enlarging the time period. However, the appellant would need to file an application and set out convincing reasons in order for the court to exercise its discretion. On the facts, the appellant's solicitor's claimed that he had only come to realise that the notice of appeal had not been served after the respondent's application was served on his firm was
H inaccurate. The respondent had in their affidavit in support of the respondent's application, exhibited the appellant's solicitor's letter dated 3 October 2014 to them. The fact that the appellant's solicitor's letter was dated 3 October 2014 itself showed that no attempt was made to serve the notice of appeal before the deadline. Further, the attempt to put the blame on the clerk was not convincing. There was a lack of
I candour on their part. (paras 6, 7 & 12)

(2) The appellant's application was only filed on 11 November 2014 as compared to the respondent's application which was filed on 29 October 2014. The appellant only deemed it necessary to make an application for an extension of time when faced with the prospect of having the appeal struck out. The appellant's delay in making their application suggested and gave the impression that the solicitors were lackadaisical in their approach towards the court's process. If the courts were to allow an application for an extension where the solicitors have not exhibited any sense of remorse or explanation that the mistake was unintentional, the system of justice and its rules and procedure would stand in danger of being taken for granted. This could lead to chaos in the conduct of litigation. (paras 13 &15)

Case(s) referred to:

Bank Utama (Malaysia) Bhd v. Sistem Bis Komputer Sdn Bhd & Ors [1994] 4 CLJ 347 HC ***(refd)***

Doyle v. Olby Ltd [1969] 2 All ER 119 ***(refd)***

Majlis Perbandaran Kangar v. Sonati Development Corporation Sdn Bhd [2006] 4 CLJ 953 CA ***(refd)***

Ong Guan Teck v. Hijjas Kasturi [1982] CLJ 31; [1982] CLJ (Rep) 616 HC ***(refd)***

Syarikat Telekom Malaysia v. Business Chinese Directory Sdn Bhd [1994] 2 CLJ 729 SC ***(refd)***

Tong Lee Hwa & Anor v. Malayan Banking Bhd [1978] 1 LNS 219 FC ***(refd)***

For the appellant - Ahmad Shukri Abd Rahman; M/s Shukri-Poh Leng & Assocs
For the respondents - Chew Chang Min; M/s Kheng Hoe & Partners

Reported by Sandra Gabriel

JUDGMENT

Mohamed Zaini Mazlan JC:

Introduction

[1] The appellant, who was the plaintiff in the Sessions Court, had its claim dismissed by the Sessions Court after a full trial. The decision was delivered on 4 September 2014. It had 12 days to file its appeal, and did just that, but failed to serve the notice of appeal on the respondent's solicitors within the 12 days period as prescribed by the rules. These facts are not disputed.

[2] The respondent proceeded to file an application to strike out the appeal ("the respondent's application"). The appellant then filed an application for an extension of time to serve the notice of appeal ("the appellant's application").

[3] Both applications were heard and decided simultaneously. The end result was that the appellant's application was dismissed, and the respondent's application allowed, with agreed costs of RM250 for each application.

A **Brief Facts**

[4] The affidavit in support of the appellant's application was affirmed by the solicitor in charge. He claimed that he had on the day that he had filed the notice of appeal, instructed his firm's clerk to serve the notice of appeal on the respondent's solicitors. He had left it at that, and claimed that he had
B only realised that the notice of appeal has not been served, when the respondent's application was served on his firm. The respondent however had in their affidavit, asserted that the notice of appeal was served on 7 October 2014, and that the respondent's application was filed on 29 October 2014.

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[5] The appellant submits that the respondent had already been informed of the appellant's intention to appeal, and that the delay does not prejudice the respondent. If it did, costs would be an adequate compensation.

The Law

D **[6]** It is settled law, that an appeal is not competent until the notice of appeal is not only filed but also served; *Tong Lee Hwa & Anor v. Malayan Banking Bhd* [1978] 1 LNS 219 (FC).

[7] Nevertheless, a notice of appeal, which is not served within time, is
E merely an irregularity, and that this can be cured by enlarging the time period. The appellant however will still need to file an application, and set out convincing reasons in order for the court to exercise its discretion; *Majlis Perbandaran Kangar v. Sonati Development Corporation Sdn Bhd* [2006] 4 CLJ 953.

F **Findings**

[8] There are some material factors that need to be considered, such as the length of time for the delay, and the time taken to rectify the error. The mistake here seemed to have been occasioned by the appellant's solicitors. It is irrelevant whether the mistake was due to the solicitor's employee or
G agent, for a solicitor is responsible for the conduct of his cases. The solicitor in charge should not have taken for granted that his clerk had served the notice of appeal, but should have verified that it was done.

[9] Nevertheless, a mistake of by solicitors is not always fatal. The courts will where necessary, strive to ensure that litigants do not suffer for the
H mistakes made by their solicitors. Lord Denning had this to say in *Doyle v. Olby Ltd* [1969] 2 All ER 119:

> We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far we can. We will correct it whenever we are able to do so without injustice to the other
I side. (pg 121)

[10] The solicitors' mistake alone is not fatal. The respondent has had notice of the appeal as claimed by the appellant, and was eventually served with the notice of appeal, *albeit* late. That factor alone however is not sufficient.

[11] It will do great injustice to any litigants, and our courts, if a mere mistake or delay can be readily forgiven without cogent reasons. The steps taken to rectify a mistake must be done at the earliest possible opportunity. Most importantly, the solicitors concerned should be forthright and exhibit a sense of remorse, more so if the mistake was theirs.

[12] The appellant's solicitor's claim that he had only come to realise that the notice of appeal has not been served after the respondent's application was served on his firm, is, to put it mildly, inaccurate. The respondent had in their affidavit in support of the respondent's application, exhibited the appellant's solicitors' letter to them dated 3 October 2014, which was received on 7 October 2014. The notice of appeal was served with this letter. The fact that the appellant's solicitors' letter was dated 3 October 2014 itself shows that no attempt was made to serve the notice of appeal before the deadline of 18 September 2014. Faced with this evidence, the appellant should have at least sought to offer an explanation. They have not done so. Their attempt to put the blame on their clerk in light of this fact is with respect, not convincing. There was a lack of candour on their part.

[13] Other than the reason for the delay, the other factor that needs to be taken into consideration is the length of time taken to file the application for an extension of time; *Bank Utama (Malaysia) Bhd v. Sistem Bis Komputer Sdn Bhd & Ors* [1994] 4 CLJ 347. The appellant's application was only filed on 11 November 2014. Compare with the fact that the respondent's application was filed on 29 October 2014, it is obvious that the appellant had only deemed it necessary to make an application for an extension of time when faced with the prospect of having the appeal struck out.

[14] What is also apparent that the appellant's application was only filed some time after the respondent's application was filed. If the deadline for the notice of appeal is to be used as a measurement, the applicant's application was filed close to two months after the deadline. There was no explanation offered. To justify its application for an extension of time, the appellant has to provide some material for this court's consideration, failing which, a party in breach of the rules, as Hashim Yeop A Sani J held in the case of *Ong Guan Teck v. Hijjas Kasturi* [1982] CLJ 31; [1982] CLJ (Rep) 616 "... would have an unfettered right to extension of time which would defeat the very purpose and object of the rules on limitation of period".

Conclusion

[15] The appellant's delay in making their application for an extension of time suggests and gives the impression that the solicitors were lackadaisical in their approach towards the court's process. If the courts were to allow an

application for an extension where the solicitors have not exhibited any sense of remorse or explanation that the mistake was unintentional, our system of justice and its rules and procedure will stand in danger of being taken for granted. This could lead to chaos in the conduct of litigation; *Syarikat Telekom Malaysia v. Business Chinese Directory Sdn Bhd* [1994] 2 CLJ 729.

[16] It is for these reasons that the appellant's application was dismissed and the respondent's application allowed.